No. 22699

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE RANCH,

Appellants

v.

WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States, and STEWART L. UDALL, Secretary of the Interior of the United States of America,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

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I N D E X

CITATIONS

Cases:

Cases cont'd:

Cases cont'd:

Constitution and Statutes:

Miscellaneous:

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OPINION BELOW

District Judge Walter E. Craig did not write an opinion but his findings of fact and conclusions of law appear at pages 141-143 of the record.

JURISDICTION

Summary judgment was entered on November 13, 1967 (R. 144). Notice of appeal was filed on December 27, 1967

(R. 146). This Court has jurisdiction over this appeal under 28 U.S.C. sec. 1291.

ISSUES PRESENTED

Whether the complaint seeking reversal under the Administrative Procedure Act of the refusal to renew grazing permits under the Taylor Grazing Act was properly dismissed on the grounds that the district court lacked jurisdiction because:

1. The Secretary's action was agency action by law committed to agency discretion; and

2. The permits had, by their own terms, expired on June 30, 1961, making this action moot.

STATUTES AND PUBLIC LAND ORDER INVOLVED

The Administrative Procedure Act, 5 U.S.C. sec. 701, provides in pertinent part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law. * * *

Sections 2 and 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. secs. 315a and 315b, provide in relevant part:

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, * * * and do any and all things necessary to accomplish the purposes of this chapter * * *.
>
> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts * * * as under his rules and regulations are entitled to participate in the use of the range * * * the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands.

Section 2 of Public Law 85-337, 72 Stat. 28, 43 U.S.C. sec. 156, provides in relevant part:

> No public land, water, or land and water area shall, except by Act of Congress, on and after February 28, 1958 be (1) withdrawn from settlement, location, sale, or entry for the use of the Department of Defense for defense purposes; * * * if such withdrawal, reservation, or restriction would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of enactment of this Act * * *.

Public Land Order 848, 17 Fed. Reg. 6099 (1952), provides in part:

ARIZONA

WITHDRAWING PUBLIC LANDS FOR USE OF DEPARTMENT OF THE ARMY IN CONNECTION WITH YUMA TEST STATION

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

Subject to valid existing rights, the public lands in the following-described areas in Arizona are hereby withdrawn from all forms of appropriation under the public-land laws, and reserved for the use of the Department of the Army in connection with the Yuma Test Station:

[Description of land omitted.]

The area described including both public and non-public lands aggregate approximately 892,570 acres.

This order shall take precedence over, but not otherwise affect, (1) the order of July 30, 1941, of the Secretary of the Interior establishing Arizona Grazing District No. 3, and (2) the orders of January 31, 1903, October 6, 1921, and March 14, 1929, of the Secretary of the Interior and the order of May 5, 1950 of the Bureau of Reclamation withdrawing lands for Reclamation purposes so far as such orders affect any of the above-described lands: * * *.

It is intended the lands described herein shall be returned to the administration of the Department of the Interior when they are no longer needed for the purpose for which they are reserved.

R. D. SEARLES,
Acting Secretary of the Interior.

July 1, 1952.

STATEMENT

The Mollohans 1/ brought this action pursuant to Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. sec. 702 (formerly 5 U.S.C. sec. 1009), to reverse a decision of the Secretary of the Interior, affirming intermediate departmental appeals which sustained the refusal to renew the Mollohans' grazing permits as to certain lands located within the boundaries of the Yuma Test Station in Arizona (R. 1). On cross-motions, the district court granted summary judgment for the federal officials and dismissed the Mollohans' action (R. 144-145).

The material facts are as follows: Some time prior to 1952 the Department of the Interior granted the Mollohans and their predecessors in interest grazing permits authorizing them to use portions of the federal range. Since the general area is exceptionally dry and the range lacks available feed, for most years prior to the withdrawal date in 1952, in order to preserve their rights, the Mollohans had applied for and received nonuse licenses.

After the date of the withdrawal, July 1, 1952, the Army did not (as it was entitled to) request the Department of the Interior to forthwith cancel existing 10-year permits and

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1/ We shall, for convenience, refer to all of the appellants herein as "the Mollohans."

annual licenses within the withdrawn area. Pending the need for actual use, the Army instructed Interior to continue issuing formal annual permits so that upon their cancellation the Army might make payments to their holders, pursuant to the Act of July 9, 1942, 43 U.S.C. sec. 315q. 2/ Consequently, not only were existing licenses within the withdrawal area permitted to continue for the remainder of their terms, but they were in fact renewed for successive yearly terms.

In 1958, the United States instituted a condemnation action to acquire a leasehold estate in the area withdrawn for use of the Yuma Test Station. On July 14, 1960, the District Manager formally notified the Mollohans that so much of their permits that were located within the withdrawn area would be terminated at the expiration date of their existing permits. At that time, the Mollohans were holders of annual nonuse permits running from July 1, 1960, to June 30, 1961. 3/

2/ Withdrawal of Taylor Act grazing permits are noncompensable. United States v. Cox, 190 F.2d 293 (C.A. 10, 1951), cert. den., 342 U.S. 867. Congress enacted the Act of July 9, 1942, to relieve permit holders from such noncompensable hardships by providing that when land was withdrawn for war or national defense purposes, permit holders would be paid such amounts as the head of the Department or agency should determine to be fair and reasonable.

3/ The Mollohans challenge the right of the Secretary to "cancel" their permits. Technically, this does not accord with the actual facts. No permit here was ever cancelled during its term. The permit holders were simply informed that on their expiration date the permits would not be renewed, and they were not.

Hearings commenced by the Mollohans in 1960 in the Department of the Interior resulted in a decision declining to renew the grazing permits. This decision was affirmed on administrative appeals to the Bureau of Land Management and the Secretary. This action was then filed challenging the Secretary's final decision.

The Mollohans argued that the Secretary did not have authority to terminate their grazing privileges under Public Land Order 848, because of the enactment of Section 2 of Public Law 85-337, supra, 43 U.S.C. sec. 156, effective February 28, 1958, which limits the right of withdrawal and also, apparently, because the Government had waited for eight years after the date of Public Land Order 848 before terminating the Mollohans' rights.

The case was submitted to the district court on cross-motions for summary judment (R. 10,111). The court granted summary judgment for the federal officials (R. 144). In the findings and conclusions, the district court held first, that Public Land Order 848 was still in effect and had not been superseded, modified or altered; and second, that the Mollohans' permits were mere licenses, revocable at will by the United States without payment of compensation (R. 141-143). This appeal followed.

ARGUMENT

I

THE COMPLAINT, SEEKING TO COMPEL ISSUANCE OF PERMITS UNDER THE TAYLOR GRAZING ACT, WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION

The Mollohans assert that the district court's jurisdiction rested solely on the Administrative Procedure Act. We have steadfastly maintained that the A.P.A. is not a waiver of sovereign immunity or a jurisdictional consent to sue the Secretary. See Chournos v. United States, 335 F.2d 918, 919 (C.A. 10, 1964); Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (C.A. 8, 1967). However, we show in the Argument to follow that this case falls within the language of the cases expressly excepted from the review standards of the A.P.A., in that the agency action involved is committed to the discretion of the Secretary. Hence, while the question of the A.P.A. as a jurisdictional grant is generally important, and our views are expressed in the briefs in two cases now pending before this Court (United States, et al. v. Walker, No. 22379, and State of Washington v. Udall, No. 22413), it may not be essential to disposition of the present case.

The most recent decision of this Court on the subject, Converse v. Udall (No. 21697, Aug. 19, 1968) not yet reported, states that the A.P.A. "does apply," citing Adams v. Witmer,

271 F.2d 29, 32-33 (C.A. 9, 1958); Coleman v. United States, 363 F.2d 190, 379 F.2d 555 (C.A. 9, 1967), rev'd 390 U.S. 599 (1968); and Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959), and that "The portion of our decision in Coleman dealing with the Administrative Procedure Act was not questioned by the Supreme Court." The answer is that the point, although briefed by respondents, was never reached by the Supreme Court in Coleman. The fact is that there is no reasoned explanation in any opinion of this Circuit, including Adams, Converse and Coleman, of how the A.P.A. constitutes a grant of jurisdiction to sue the Secretary and, more important, of why the mandamus statute, 28 U.S.C. sec. 1361, should be rejected as the jurisdictional predicate for a suit against the Secretary. (We show later why the mandamus statute cannot support jurisdiction over the Secretary in this case.) Foster, it must be observed, was a suit filed in the district court for the District of Columbia. That court had inherent mandamus jurisdiction over the Secretary, since his official place of business is, by statute, the District of Columbia. No other federal court had such jurisdiction until the enactment of the mandamus statute in 1962.

Concerning Coleman, we note in elaboration that the A.P.A. was invoked as a purported basis for judicial review only by the defendant. The jurisdiction of the district court in that case was clear. It rested on the fact that the United

States instituted the suit seeking ejectment and the district court granted the relief sought. Reversing the court of appeals, the Supreme Court agreed that such judgment was correct. Hence, no problem of any kind concerning the A.P.A. was actually involved in the case. The A.P.A. was involved only by defendants' counterclaim, and this Court's discussion was addressed to scope of review, not jurisdiction of the court. Indeed, the lack of jurisdiction of the Southern District of California over the Secretary of the Interior was recognized when, after having its attention called to the fact that it could not, as it purported to (363 F.2d at p. 204), order remand to the Secretary in a case to which he was not a party, the court "invited" the Secretary to join as a counterclaim defendant. 379 F.2d at 556. He did so under 28 U.S.C. sec. 1361. Adams v. Witmer, 271 F.2d 29 (C.A. 9, 1958), reh. den., 271 F.2d 37 (1959), did not involve either the United States or the Secretary of the Interior as a defendant. In short, neither Coleman, Adams nor Foster presents the problem of power of the federal district court to issue orders under the Administrative Procedure Act addressed to defendants not within the court's geographic jurisdiction. That problem is presented in the other cases cited above, presently pending before this Court.

A. Jurisdiction to review the Secretary's refusal to renew the permits under the Administrative Procedure Act is precluded. - There is no jurisdiction to review the cancellation or, more accurately, the nonrenewal of the Mollohans' grazing privileges. Basically, the Mollohans' complaint is that their grazing privileges located within the Yuma Test Area (the withdrawn area) were improperly cancelled or not renewed by the Secretary of the Interior upon their expiration.

By enacting the Taylor Grazing Act, Congress gave the Secretary of the Interior broad power to "make such rules and regulations * * * and do any and all things necessary" to regulate the use and occupancy of grazing districts. Section 2, 43 U.S.C. sec. 315(a). He is authorized "to issue or cause to be issued" grazing permits to such persons "as under his rules and regulations are entitled to participate in the use of the range." Section 3, supra, 43 U.S.C. sec. 315(b). Consequently, even if upon the expiration of their licenses the Mollohans had re-applied for such licenses, they could not have obtained a court order directing their issuance, because such action is "agency action * * * committed to agency discretion by law" made exempt from judicial review by Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 701 (formerly 5 U.S.C. sec. 1009). So in Ferry v. Udall, 336 F.2d 706 (1964), this Court held that courts may not review decisions committed to administrative discretion pursuant to

a "permissive type" statute. Thus, in Sellas v. Kirk, 200 F.2d 217 (1952), cert. den., 345 U.S. 940, this Circuit sustained the dismissal of a suit to enjoin a range manager of the Department of the Interior from reducing plaintiff's permitted grazing on public lands, on the ground that granting of such grazing privileges was "agency action by law committed to agency discretion" within the meaning of Section 10, and hence was not subject to judicial review. This characterization of nonreviewable administrative action under the Taylor Grazing Act is no longer debatable. United States v. Morrell, 331 F.2d 498, 500, 502 (C.A. 10, 1964); Oman v. United States, 195 F.2d 710 (C.A. 10, 1952), cert den., 343 U.S. 977; Chournos v. United States, 193 F.2d 321, 323-324 (C.A. 10, 1951); Oman v. United States, 179 F.2d 738, 740-741 (C.A. 10, 1949); Bedke v. Quinn, 154 F.Supp. 370 (D. Idaho, 1957); Hamel v. Nelson, 226 F.Supp. 96 (N.D. Cal. 1963).

B. Mandamus jurisdiction (28 U.S.C. sec. 1361) is not applicable. - The mandamus statute explicity grants district courts jurisdiction of any action "in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." It is not applicable here.

Mandamus jurisdiction empowers a court only to enforce ministerial duties, not to review the merits of substantive decisions. E.g., United States v. Wilbur, 283 U.S. 414,

420 (1931); Wilbur v. United States, 281 U.S. 206, 218-219 (1930); Decatur v. Paulding, 14 Pet. 497 (1840). This meaning of "mandamus" was intended by Congress in enacting 28 U.S.C. sec. 1361. See 2 U.S.Cong. News, 87th Cong., 2d sess. (1962) pp. 2785, 2788-2789. In Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (C.A. 10, 1966), the court stated:

> Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory * * * The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt.

As we have just shown, there is no mandatory duty imposed by Congress on the Secretary to issue or renew Taylor Grazing Act permits.

C. Since the grazing permits expired by their own terms, the case was moot. - Article III, Section 2, of the Constitution limits the jurisdiction of federal constitutional courts to "cases" and "controversies." A lawsuit which has become moot is neither a case nor a controversy in the constitutional sense and no such federal court has the power to decide it. One useful definition of mootness was given in Burrell v. Martin, 232 F.2d 33, 37-38, note 10 (C.A. D.C. 1955):

> "* * * one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." (Emphasis in original.)

This defect in jurisdiction is so fundamental that a court will dismiss a case at any stage of the proceedings upon determining or being advised that it was moot when commenced or became moot because of subsequent events. Such disclosure has been made by admissions in open court, California v. San Pablo, &c. Railroad, 149 U.S. 308, 313 (1893); South Spring Gold Co. v. Amador Gold Co., 145 U.S. 300 (1892); or even by a letter from counsel, Tennessee, etc. R'd Co. v. Southern Tel. Co., 125 U.S. 695, 696 (1888). If the parties fail to call to the court's attention facts making a case moot, judicial notice may be taken of them: United States v. Chambers, 291 U.S. 217, 222-223 (1934) (ratification of the 21st Amendment); Gibbes v. Zimmerman, 290 U.S. 326, 331 (1933) (enactment of statute and issuance of orders pursuant thereto); Abie State Bank v. Bryan, 282 U.S. 765, 777-778 (enactment of statute pending appeal); United States v. Hamburg-Amerikanische Co., 239 U.S. 466, 475 (1916) (war among the European powers); Richardson v. McChesney, 218 U.S. 487, 492 (1910) (service of their terms by specific members of Congress

and election of their successors; expiration of terms of office of state official); Wilson v. Shaw, 204 U.S. 24, 30 (1907) (specific disbursements from United States Treasury); Tennessee v. Condon, 189 U.S. 64, 69-70 (1903) (provisions of state constitution); Mills v. Green, 159 U.S. 651, 657-658 (1895) (dates of state elections and opening sessions of state legislature and constitutional convention).

As noted by Sidney A. Diamond in "Federal Jurisdiction to Decide Moot Cases," 94 Univ. of Pa. L. Rev. 125, 126-127 (1946):

> Intent plays no part in determining whether or not a case is moot. No matter how anxious the parties may be to avoid the effect of mootness, the jurisdiction of the court cannot be enlarged. A stipulation which attempts to keep the controversy alive will be disregarded if the justiciable issue has disappeared, despite a continuing disagreement between the parties on the law. [California v. San Pablo & T. R.R., 149 U.S. 308 (1893) (tax paid under stipulation); San Mateo County v. Southern Pacific R.R., 116 U.S. 138 (1885) (similar facts)]. A statute which purports to confer jurisdiction to decide a moot case is unconstitutional. [Muskrat v. United States, 219 U.S. 346 (1911)].

The passage of time alone may moot a case. An action contesting the validity of a state child labor statute must be dismissed if, pending appeal, the child on whose behalf the suit was brought passes the maximum age affected by the statute, because the statute, even if valid, can no longer be enforced against him. Atherton Mills v. Johnston, 259 U.S. 13 (1922).

If, pending a criminal appeal, the sentence has been fully served, the appeal must be dismissed. St. Pierre v. United States, 319 U.S. 41 (1943). Similarly, this Circuit dismissed as moot an action against an employee by an international union seeking declaratory and injunctive relief where, the dispute having been settled and the union's sole chapter no longer being in existence, the chapter no longer represented any employees of the employer. Flight Engineers Inter. Ass'n v. Continental Air Lines, Inc., 297 F.2d 397, 401-402 (1961), cert. den., 369 U.S. 871. In Jones v. Montague, 194 U.S. 147 (1904), the plaintiff sued to enjoin an alleged violation of the right of suffrage. Prior to final appeal, the election was held so that it was no longer possible to grant any relief. The court dismissed, because "the thing sought to be prohibited has been done and cannot be undone by any order of court." 194 U.S. at 153.

In Security Life Ins. Co. v. Prewitt, 200 U.S. 446 (1906), plaintiff, a New York corporation, filed suit on January 27, 1905, to cancel and set aside the revocation by the Insurance Commissioner of Kentucky of plaintiff's permit to do business in that state. Plaintiff's permit expired of its own terms on July 1, 1905. The Supreme Court sustained the dismissal of the action by the Kentucky Court of Appeals on the grounds of mootness, Judge Peckham writing (200 U.S. at 449-450):

> If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired * * *. The refusal on the part of the Insurance Commissioner to grant authority to plaintiff to transact business after the old permit had expired does not raise a Federal question. Since the writ of error was filed the permit has ceased to have any effect, and, therefore, an event has occurred which renders it impossible for this court to grant any effectual relief in favor of plaintiff in error. In such case the court will dismiss the writ of error. Mills v. Green, 159 U.S. 651; Tennessee v. Condon, 189 U.S. 64; Jones v. Montague, 194 U.S. 147.
>
> It would seem to be plain that the cancelation of a revocation of a permit, when the permit itself has become of no effect by virtue of the lapse of time, would be useless business, and would give no practical relief to the company.

When on June 30, 1961, the Mollohans' licenses of their own terms expired, this action, too, became moot. As the district court found here, "There is no evidence that the plaintiffs applied for a license for any subsequent years, i.e., beginning with July 1, 1961" (R. 142). However useful it might be to test the validity of Public Land Order 848 and actions of the Bureau of Land Management thereunder, since the action became moot the federal courts were ousted of jurisdiction.

II

THE MOLLOHANS' OTHER ARGUMENTS HAVE NO MERIT

Since we feel the argument above is dispositive of this appeal and since the Mollohans' other contentions are without merit, we treat them summarily.

A. Public Law 85-337, which permits withdrawals in excess of 5,000 acres only upon Congressional approval, took effect on February 28, 1958, and therefore has no effect on Public Land Order 848, effective July 1, 1952. - The Mollohans argue that Public Land Order 848, supra, dated July 1, 1952, cannot provide a legal basis for cancellation of their grazing allotments, because it was superseded by Public Law 85-337, supra, 43 U.S.C. secs. 155-158, which provides that no withdrawals in excess of 5,000 acres can be made by the military without first obtaining Congressional approval (Br. 2, 21-36).

The short answer to this argument is that no grazing allotment of theirs was ever cancelled. The Mollohans held annual nonuse licenses which ran from July 1, 1960, to June 30, 1961. These simply expired of their own force and were not renewed.

Public Land Order 848 does not serve as the necessary basis of the Government's action here so the Mollohans' arguments challenging the validity of withdrawals under Public Land Order 848 are irrelevant.

The background and efficacy of Public Land Order 848 can, however, be stated quite simply. On July 1, 1952, the Secretary of the Interior, acting under the authority delegated to him by Executive Order 10355 of May 26, 1952, 17 Fed. Reg. 4831, withdrew for the use of the Department of the Army certain public land in Arizona from all forms of appropriation under the Public Land Laws.

Executive Order 10355 notwithstanding, the President has general or inherent authority by virtue of his office to withdraw public land. United States v. Midwest Oil Co., 236 U.S. 459, 471-472 (1915); Wilbur v. United States, 46 F.2d 217, 220 (C.A. D.C. 1930). In addition, he has specific authority conferred upon him by the Pickett Act, 36 Stat. 847, 43 U.S.C. sec. 141. The President's delegation of authority to the Secretary in Section 1 of Executive Order 10355, 17 Fed. Reg. 4831, recited both the President's inherent and specific statutory authority to make such delegation. See Udall v. Tallman, 380 U.S. 1, 21-22 (1965).

Public Law 85-337, supra, 43 U.S.C. secs. 155-158, does modify the power of the military to make public land withdrawals in excess of 5,000 acres by requiring that such withdrawals have Congressional approval. Public Law 85-337 has, however, absolutely no effect upon Public Land Order 848 of July 1, 1952. Section 1 of Public Law 85-337 states that

"* * * on or after February 28, 1958, the provisions hereof shall apply to the withdrawal * * * by the Department of Defense for defense purposes of the public lands of the United States * * *." Public Law 85-337 operates only prospectively and does not affect in the slightest the 1952 land withdrawal order. That is why the Findings of Fact and Conclusions of Law dated August 11, 1967, correctly state (R. 142):

> Public Land Order No. 848 dated July 1, 1952, volume 17, Federal Register, page 8099, 4/ is still in effect, and has not been superseded, modified, or altered.

B. The Government's filing of a condemnation action constituted no recognition of any rights of the Mollohans. - The Mollohans assert (Br. 19-20) that the filing of a condemnation action "constituted an express recognition by the Department of the Army that the Public Land Order did not provide it with the necessary withdrawal of the grazing rights of appellant

The initiation of a condemnation action constitutes neither the admission of any rights in others, nor the waiver of any rights of the Government. One of the most frequent uses of condemnation proceedings is simply to perfect title against unknown interests. United States v. Certain Land, 345 U.S.

4/ Sic. The correct page is 6099.

344, 348 (1953); United States v. Carmack, 329 U.S. 230, 239 (1946); Danforth v. United States, 308 U.S. 271, 282-283 (1939); cf. Best v. Humboldt Mining Co., 371 U.S. 334, 340 (1963).

So, in United States v. 93.970 Acres, 360 U.S. 328 (1959), the Government revoked a lease which provided that it could be revoked upon a determination that such revocation is essential, and which was entered into under a statute requiring that such leases be revocable "at any time." The Supreme Court held that by bringing a condemnation action, after serving notice of revocation, the Government was not estopped to assert that the lessee had no compensable interest in the property or that title was not in the United States.

C. Irrespective of Public Land Order 848, however, the District Manager could have cancelled the Mollohans' Taylor Act licenses because these licenses are privileges only which the United States can cancel or withdraw at any time without payment of compensation. - Section 3 of the Taylor Grazing Act, supra, 43 U.S.C. sec. 315(b), states that the issuance of any such license "shall not create any right, title, interest, or estate in or to the lands." Consequently, it has been definitively established in this and other circuits that permits issued under the Taylor Grazing Act confer upon the recipients a mere privilege to graze livestock--a privilege which can be withdrawn by the United States without payment

or compensation. Osborne v. United States, 145 F.2d 892, 896 (C.A. 9, 1944); United States v. Cox, 190 F.2d 293, 294-297 (C.A. 10, 1951), cert. den., 342 U.S. 867; United States v. Jaramillo, 190 F.2d 300 (C.A. 10, 1951); Oman v. United States, 179 F.2d 738, 742 (C.A. 10, 1951); Bowman v. Udall, 243 F.Supp. 672, 678 (D. D.C. 1965), aff'd sub nom. Hinton v. Udall, 364 F.2d 676 (C.A. D.C. 1966).

As stated above, the District Manager did not "cancel" the Mollohans' grazing licenses on the basis of Public Land Order 848, although he could have. All he did was to decline to renew the annual licenses after they had expired. Since the Mollohans' licenses were revocable at any time without payment of compensation, they can hardly point to any injury based on the District Manager's decision to let these licenses run their course and expire upon their own terms. The Mollohans have received every consideration to which they were entitled.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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